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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 239

MARION M. PICKLE, JR.,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. .....

MARION M. PICKLE, JR.,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner Marion M. Pickle, Jr., prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered in this cause on January 8, 1964, and upon which a motion to rehear was denied by the Supreme Court of Tennessee on April 30, 1964.

CITATIONS TO OPINION BELOW

All references to the record herein will refer to the numbers in the left column of the pages of the certified record of the Supreme Court of Tennessee, which is filed herein, and will be designated as follows: "(R., p.)".

Memorandum Opinion of the Supreme Court of Tennessee is as yet unreported. The original opinion of the Supreme Court of Tennessee appears at R., p. 237, and a copy is annexed hereto as an Appendix on page A1.

The judgment pursuant to the original opinion of the Supreme Court of Tennessee appears at R., p. 242, and a copy is annexed hereto as an Appendix on page A4.

The opinion of the Supreme Court of Tennessee on the petition to rehear was filed by the Court on April 8, 1964, is as yet unreported, and appears at R., p. 250, and a copy is annexed hereto as an Appendix on page A5.

The order denying the petition to rehear was entered on April 30, 1964, and appears at R., p. 253, and a copy is annexed hereto as an Appendix on page A7.

JURISDICTION

Final judgment of the Supreme Court of Tennessee was entered on April 30, 1964 (R., p. 252). Jurisdiction of this Court is invoked under 28 U.S.C., 1257(3).

HOW FEDERAL QUESTIONS ARE PRESENTED

For convenience and clarity, the parties will be referred to as they appeared in the trial court, to-wit: the petitioner as "defendant," and respondent as "the State".

(1) Defendant was indicted November 23, 1962, by the grand jury of Knox County, Tennessee, upon the charge of assault and battery upon the person of one J. E. Banks, Sr. The case was tried in the Criminal Court for Knox County, commencing on April 4, 1963 and terminating with a verdict of guilty on April 9, 1963, the jury

having been respited from April 5 to April 9 (R., pp. 152-154). The jury assessed a fine of $51.00 as punishment of the defendant (R., p. 154). On his own volition, the trial judge thereafter added a workhouse sentence of 90 days, making the final judgment provide for $51.00 fine and confinement in the workhouse for 90 days (R., p. 17).

The motion for new trial was timely filed (R., p. 16), and overruled (R., p. 17). A motion in arrest of judgment was filed (R., pp. 19-28), and overruled (R., pp. 29-31), and the case appealed to the Supreme Court of Tennessee, resulting in the judgment being affirmed, as aforesaid.

Prior to trial, the defendant filed a plea in abatement to the indictment (R. pp. 5-8), setting forth that the juries which indicted him and tried him had not been selected in accordance with the statutes of the State of Tennessee, to-wit: Chapter 173, Private Acts of Tennessee for the year 1911, as amended, in that a jury commission of three members had not made up the list of jurors who were to serve; the jurors were unlawfully selected by one individual, rather than by the jury commission; the one individual designated the persons whom he desired to serve as jurors and prepared a list, which list he turned over to the Judge of the Criminal Court and the jurors were drawn by said Judge and not drawn by lot or at random by a child under 10 years of age, as required by said Act; said list submitted to the Judge was not compiled by said individual from a list furnished him by the Justices of Peace of Knox County, as required by the statute. The State joined issue on the plea in abatement by replication (R., p. 11), and the plea in abatement was overruled. (R., p. 12).

Defendant contends such action by the trial court denying the plea in abatement, and thus denying him the

right to an impartial jury in accordance with law, deprived him of his rights under the Fourteenth Amendment to the Constitution of the United States, in that he was deprived of his liberty without due process of law, and was denied the equal protection of the law.

After conviction, defendant filed a motion in arrest of judgment, setting forth that the matters raised by said plea in abatement denied his rights under the Constitution of the United States, in that he was thus deprived of his constitutional rights to a fair and impartial trial by a jury, and deprived of equal protection of the laws and of due process of the laws. (R., pp. 19-21). The motion in arrest of judgment was overruled. (R., pp. 29-31).

(2) When this case came on for hearing in the Supreme Court of Tennessee, it appeared that the transcript of the case did not contain evidence showing the jury list from which the petit jury in the lower court had been drawn, and the manner in which the grand and petit jurors had been selected in defendant's case, and for this reason a motion was filed by the defendant on October 4, 1963, in the Supreme Court of Tennessee suggesting a diminution of the record, seeking an order upon the Clerk of the trial court to supply the evidence which had not been included in the transcript. (R., p. 183). The Supreme Court of Tennessee, in its opinion, recites that there was no evidence in the record with respect to the manner in which the petit and grand jurors were selected, or that the petit and grand jurors were selected unlawfully (R., p. 239), and ignored the motion suggesting a diminution of the record. The Supreme Court of Tennessee thus refused to order the Clerk of the trial court to supply the deficient evidence. The defendant filed a petition to rehear in the Supreme Court of Tennessee, on January 16, 1964 (R., p. 243), pointing out that the Supreme Court of Tennessee had

failed to act upon his motion suggesting a diminution of the record. The Supreme Court in its opinion on the petition to rehear states that the motion suggesting a diminution of the record was overruled because nothing could be gained by bringing up the matters set forth in the motion. (R., pp. 250-252).

The refusal of the Supreme Court of Tennessee to order a complete record as to what transpired in the trial court was a deprivation by the State of defendant's liberty without due process of law, and a denial to the defendant of the equal protection of the law.

QUESTIONS PRESENTED

Question No. 1. Was defendant denied due process of law, and equal protection of the law, as guaranteed him under the Fourteenth Amendment to the Constitution of the United States, by reason of his having been indicted and tried by a grand jury and petit jury, respectively, which juries were illegally hand-picked, rather than being selected at random, or lot, as required by the laws of the State of Tennessee?

Question No. 2. Was defendant denied due process of law, and equal protection of the law, as guaranteed him under the Fourteenth Amendment to the Constitution of the United States, by the action of the Supreme Court of Tennessee in denying defendant's motion suggesting a diminution of the record, and thus depriving him of the evidence in the trial court, which showed that the grand jury which indicted him, and the petit jury which tried him, were illegally selected?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides:

> "§1. **Citizenship—Due process of law—Equal protection.**—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article VI[2] of the Constitution of the United States provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

STATEMENT

See "HOW FEDERAL QUESTIONS ARE PRESENTED", *supra*.

REASONS FOR GRANTING THE WRIT

Question No. 1. The question presented here is of major importance and significance to the administration of justice, not only for this defendant, but for all others similarly situated.

Both the grand and petit jurors in this case were unlawfully hand-picked, appointed and selected by one individual rather than by lot. The jurors were contaminated with such bias and prejudice, and convictions, as this one person who selected them possessed. The jurors did not represent a cross-section of the population and could not be peers of defendant. These jurors could well have been selected by this one person because they were liberal, conservative; white, colored; Jew, Gentile, Catholic, Protestant, or Mohammedan, all depending upon the views of the person who selected them. To permit jurors to be selected in this manner destroys the element of fundamental fairness essential to the very concept of justice.

The right to an impartially selected jury is guaranteed by the Fourteenth Amendment. *Wolfe* v. *Nash*, (C.C.A., Mo., 1963) 313 F.2d 393, cert. denied 374 U.S. 817, 83 S. Ct. 1713; *U. S. ex rel. Sturdivant* v. *State of New Jersey*, (C.C.A., N.J., 1961) 289 F.2d 846, cert. denied 368 U.S. 864, 82 S. Ct. 109.

The equal protection of the law clause of the Fourteenth Amendment applies to all actions of a State by whatever modes such action be taken, whether it be legislative, executive or judicial. *Standard Computing Scale Co.* v. *Farrell*, 249 U.S. 571; *Missouri* v. *Dockery*, 191 U.S 170; *Ex parte Virginia*, 100 U.S 347

The illegal and unlawful actions of a board or commission, such as a jury commission in the selection of juries, is an action under color of State law, and comes within the prohibitions of the Fourteenth Amendment with respect to due process and equal protection of the law. *Gray* v. *Sanders*, 372 U.S. 368, 83 S. Ct. 801; *Mooney* v. *Hollohan*, 294 U.S. 103, 98 A.L.R. 406; *Southern Ry. Co.* v. *Commonwealth*, 290 U.S. 190, 54 S. Ct 148; *U. S. ex rel.*

Weber v. *Rogan*, (C.A., Ill., 1949) 176 F.2d 579, cert. dismissed 338 U.S. 809, 70 S. Ct. 49; *Pacific Gas Imp. Co.* v. *Ellert*, (C.C., Calif., 1894) 64 Fed. 421; *Williams* v. *Kansas City, Mo.*, (D.C., Mo., 1952) 104 F. Supp. 848, affirmed 205 F.2d 47, cert. denied 346 U.S. 826, 74 S. Ct. 45.

Defendant in this case was denied his rights to a trial by a fair and impartial jury. Due process means fair play, and is that process of impartial law which is binding because it is right. A fair trial is implicit in the term "due process of law".

Due process was aptly defined in *Breithaupt* v. *Abram*, 352 U.S. 432, 77 S. Ct. 408, wherein this Court said that it is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct.

The due process clause requires that action by a State through any of its agencies must be consistent with fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which are not infrequently designated as "the law of the land". *Buchalter* v. *People of State of N. Y.*, 319 U.S. 427, 63 S. Ct. 1129.

Question No. 2. The refusal of the Supreme Court of Tennessee to grant the motion suggesting a diminution of the record so as to bring up the evidence showing the illegal and unlawful manner in which the juries were selected was a denial to defendant of due process. See *Nesbit* v. *Riesenman*, (1930) 148 Atl. 695, 298 Pa. 475, cert. denied 281 U.S. 754, 50 S. Ct. 408; *Huntington* v. *N. Y.*, (C.C., N.Y., 1902) 118 Fed. 683, affirmed 193 U.S. 441, 24 S. Ct. 505.

The judicial judgment in applying the due process clause must move within the limits of accepted notions of justice, and is not to be based upon the idiosyncrasies of a mere personal judgment, and an important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review, but there cannot be blind acceptance even of such weighty judgment without disregarding the historic function of civilized procedure in the progress of liberty. *Malinsky* v. *People of State of N. Y.*, 324 U S. 401, 65 S. Ct. 781.

Rule 9, Rules of the Supreme Court of the State of Tennessee, provides for suggestions of diminution of record. (209 Tenn. 790). A copy of the Rule is annexed hereto as an Appendix on page A8.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF TENNESSEE

MARION M. PICKLE, JR.
vs.
STATE OF TENNESSEE
} KNOX COUNTY CRIMINAL

Opinion

Filed January 8, 1964. W. H. Eagle, Clerk.

Marion M. Pickle, Jr., hereinafter referred to as defendant, appeals from a conviction of assault and battery, wherein the jury assessed a fine of Fifty One ($51.00) Dollars and the Trial Judge assessed a sentence of ninety (90) days in the workhouse.

The assignments of error are to the effect as follows:

(1) Defendant's plea in abatement to the indictment on the grounds that the grand jury was not selected in accordance with Chapter 173, Private Acts of 1911, as amended, which provides for a board of jury commissioners, etc., for Knox County should have been sustained.

(2) Defendant's motion in arrest of judgment based upon two irregularities (1) the Trial Judge should have recused himself on the question of whether or not the grand jury was selected in accordance with the law because he (Trial Judge) was the one who committed the error, and (2) the Trial Judge in his instruction to the jury did not tell the jury that he, under the law, had authority to impose a Workhouse sentence up to eleven months and twenty-nine days, in addition to the fine imposed by the jury, in the event the jury found the defendant guilty of the offense charged in the indictment.

(3) The evidence preponderates against the verdict and in favor of the innocence of the accused.

Defendant filed a plea in abatement, supported by affidavit to the effect the grand jury rendering the indictment under which he was convicted was not chosen according to law, same being Chapter 173, Private Acts of 1911, as amended. The order of the Trial Judge overruling this plea recites the Court heard the evidence offered by the defendant, but does not recite the evidence; and further defendant was given 90 days to prepare and file a bill of exceptions containing this evidence, which has not been done. Since we cannot tell whether the record before us contains all the evidence heard by the Trial Judge on this plea, as the record does not affirmatively show it to be all the evidence, then such cannot be reviewed here on appeal. Eatherly v. State, 118 Tenn. 371; Hall v. Hall, 193 Tenn. 74. The first assignment of error is overruled.

Defendant alleges the Trial Judge should have recused himself on the question of whether or not the grand jury was selected in accordance with the law since, if there were a mistake it was made by the Trial Judge himself. There is no merit in this assignment.

Defendant alleges as error the failure of the Trial Judge to instruct the jury, that, under the law, he had authority to impose a work house sentence in addition to any fine they might assess. On this matter the Trial Judge instructed the jury as follows:

> "In the event that you find the defendant guilty beyond a reasonable doubt and feel that the punishment should be by fine of more than $50.00, it will be your duty to fix that fine in any amount between $50.00 and $1,000.00. The law provides for a fine for a violation of this law up to $1,000.00. The constitution specifically restricts the Court from levying any

fine of more than $50.00 unless it is a fixed fine and so the Court can only fine the defendant in event of conviction up to $50.00. If you find the defendant guilty and feel that his fine should be $50.00 or less, you may report to the Court that you find the defendant guilty as charged and leave the punishment to the Court, in which event the fine can be up to $50.00. If you desire or think under the facts and circumstances of this case and the law that the fine in event of conviction should be more than $50.00, then you must fix it;"

On this question counsel for defendant in their brief state:

> "In the instant case, we respectfully insist that it was the duty of the learned trial judge to state to the jury exactly the measure of punishment which could be meted out to the defendant, both by the jury and the Court in view of the fact that the jury was not only asked to find the defendant guilty or not guilty but if guilty to fix his fine. By no other means can the jury intelligently pass upon a fine. We feel that it was extremely important that that jury know that, in additional to any fine that it might feel was justified, the trial judge could heap additional punishment on the shoulders of this defendant."

There were no special requests, nor does this record indicate the defendant invoked Section 40-2704, T.C.A.

We have not been cited, nor have we been able to find, any authority requiring a trial judge in the trial of a misdemeanor to instruct the jury that, in addition to any fine they might levy, it was also within his authority to assess a jail term of any time less than one year. In this case the assessing, or not assessing, a jail term was a matter directed solely to the Trial Judge and it was not necessary he so charge the jury. If the Trial Judge had so instructed them of his authority in this matter of a jail term, they would still have to make their judgment upon the

amount of fine, without knowing what the Trial Judge was going to do about the jail term; then what advantage would the information be to them. The second assignment of error is overruled.

We have examined the record and do not find the evidence preponderates against the verdict. Defendant strongly insists certain witnesses should be believed rather than other witnesses. The credibility of the witnesses is exclusively left to the jury as shown by a number of decisions of this Court. The third assignment of error is overruled.

Judgment affirmed.

/s/ Ross W. Dyer
Ross W. Dyer, J.

SUPREME COURT OF TENNESSEE, AT KNOXVILLE
SEPTEMBER TERM, 1963

WEDNESDAY JANUARY 8th, 1964

(Filed January 8, 1964, W. H. Eagle, Clerk.)

BE IT REMEMBERED, That at a September Term of the Supreme Court for the Eastern Division of Tennessee, held at Knoxville on the Second Monday of September, 1963, the following proceedings were had and entered of record, to-wit:

MARION M. PICKLE, JR. vs. THE STATE	No. 24 Knox County Criminal Assault & Battery Affirmed

Came the plaintiff in error by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration

thereof the Court is of opinion that there is no reversible error on the record, and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered and adjudged by the Court that the State of Tennessee recover of Marion M. Pickle, Jr., the plaintiff in error, for the use of the County of Knox, the sum of $51.00, the fine assessed against him in the Court below, together with the costs of the cause accrued in this Court and in the Court below, and execution may issue from this Court for the costs of the appeal.

It is further ordered by the Court that the plaintiff in error be confined in the county jail or workhouse of Knox County, subject to the lawful rules and regulations thereof, for a term of Ninety (90) days and that after the expiration of the aforesaid term of imprisonment he remain in the custody of the Sheriff of Knox County, until the said fine and costs are paid, secured or worked out in the manner required by law and this cause is remanded to the Criminal Court of Knox County for the execution of this judgment.

/s/ Hamilton S. Burnett

MARION M. PICKLE, JR.
vs.
STATE OF TENNESSEE
} KNOX CRIMINAL

Opinion on Petition to Rehear

(Filed April 8, 1964. W. H. Eagle, Clerk.)

A petition to rehear has been filed in this case, which is grounded on the alleged failure of this Court to consider the petitioner's motion suggesting dimunition of record, which motion was filed in this Court prior to the oral

argument of this case. The petitioner asserts that a rehearing on the "complete" record should be granted in order that the method used in selecting the jury list for the March, 1963, term of the court below may be considered by this Court in view of the reasoning of the Court of Appeals in the case of York v. Roos (opinion by Taylor, S.J., filed September 3, 1963). The petit jury which convicted the petitioner came from a jury list for the March term.

By his motion, the petitioner sought to bring before this Court the procedure used in selecting the jury list for the March term of the court below. He asserted that the minute entries of the court below show the manner in which this list was compiled, and that these entries show that the individuals on the list were selected in a manner contrary to the provisions of Chapter 173, Private Acts of 1911, the jury selection law applicable to Knox County at the time this list was prepared. In support of his assertion, the petitioner attached to his motion a number of exhibits, one of which purported to be the minute entries of the court below for November 5, 1962, and March 4, 1963. These entries include the jury lists presented to the court below in the December and March terms and also show the individuals subsequently selected from these lists for grand and petit jury duty.

In our opinion, these minute entries wholly fail to show the manner in which the individuals on these jury lists were selected. It follows from this that the entries could not show that the jury list was compiled in a manner contrary to Chapter 173 Private Acts of 1911. While it is true that these minute entries show that the Chairman of the Jury Commission presented jury lists to the court below they wholly fail to show how the names on the list were selected and who selected them. In fact, these entries fail

to show anything about the manner in which the names were selected. In York v. Roos, the actual procedure used in selecting jury lists was before the Court of Appeals, but this is not the case here.

The petitioner is wrong in his assumption that this Court failed to consider his motion. The motion was considered and overruled because nothing could be gained by bringing up the minute entries in question. The suggestion of diminution, under the circumstances would have accomplished nothing. Standard Life Ins. Co. of the South v. Adams, 174 Tenn., 405, 126 S.W.2d, 311.

From what has been said above it results that the petition to rehear must be overruled and is hereby denied.

Per Curiam.

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

SEPTEMBER TERM 1963

MARION M. PICKLE, JR.
vs.
STATE OF TENNESSEE
} KNOX COUNTY CRIMINAL

Petition to Rehear Denied

(Filed April 30, 1964. W. H. Eagle, Clerk.)

This cause came on to be further heard on the Petition to Rehear and Reply thereto, upon consideration whereof the Court is of opinion the petition to rehear is not well taken and should be denied.

It is therefore ordered and decreed by the Court that the petition to rehear is denied.

Costs on the petition to rehear will be paid by Marion M. Pickle, Jr., for which let execution issue.

/s/ Hamilton S. Burnett
/s/ S. L. Felts
/s/ Ross W. Dyer

RULES OF THE SUPREME COURT OF THE STATE OF TENNESSEE

Rule 9

"*Suggestions of Diminution of Record.*—The motion shall be reduced to writing, and verified by the signature of counsel, and shall state specifically the portion of the record omitted from the transcript, and that notice of the motion has been given to opposite counsel, and made before the case is called for trial, so that the record may be perfected for the hearing, or the imperfection will be waived. When the motion is allowed an entry on the minutes shall be made to that effect. The court will, however, in its discretion, consider any record supplied after hearing and before disposition of the case."

No. 239

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MARION M. PICKLE, JR.,
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STATE OF TENNESSEE,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

MARION M. PICKLE, JR.,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petitioner, Marion M. Pickle, Jr., was convicted of an assault and battery. A fine of $51.00 was imposed upon him by the trial jury and a sentence of ninety days in the County Workhouse was added by the Trial Judge. The conviction was appealed to the Tennessee Supreme Court and the Tennessee Supreme Court affirmed the conviction of the trial court. As stated by counsel for the petitioner, the opinion has not been published officially nor unofficially but is made Appendix A-1 to the petition for certiorari.

Counsel for the petitioner insists that the petition presents two questions (1) whether or not the petitioner was

denied due process of law and equal protection of the law as guaranteed him by the Fourteenth Amendment, Constitution of the United States because of having been tried by "an illegally hand-picked" jury, and (2) whether or not the petitioner was denied due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment, Constitution of the United States because the Supreme Court of Tennessee refused to require a diminution of the record to supply a portion thereof which showed the grand jury and petit jury were illegally selected.

BRIEF AND ARGUMENT.

Counsel for the State of Tennessee insists that there is no evidence in the record to show that the grand jury which indicted the petitioner nor the petit jury which convicted him were not properly selected. Counsel for the petitioner does not insist that there is such evidence in the record. He only insists that a diminution of the record should have been ordered for the purpose of showing that the grand jury and the petit jury were not legally selected.

The Supreme Court in its opinion stated on this question:

> "Defendant filed a plea in abatement, supported by affidavit to the effect the grand jury rendering the indictment under which he was convicted was not chosen according to law, same being Chapter 173, Private Acts of 1911, as amended. The order of the Trial Judge overruling this plea recites the Court heard the evidence offered by the defendant, but does not recite the evidence; and further defendant was given 90 days to prepare and file a bill of exceptions containing this evidence, which has not been done. Since we cannot tell whether the record before us contains all the evidence heard by the Trial Judge on this plea, as the record does not affirmatively show it to be all the evidence, then such cannot be reviewed here on appeal. Eatherly v. State, 118 Tenn. 371; Hall v. Hall, 193 Tenn. 74. The first assignment of error is overruled."
>
> **Appendix A2.**

It has long been well settled in this State that the ruling of a trial judge upon a question involving disputed or controverted facts will not be reviewed by the Supreme Court where the record fails to show affirmatively that

it contains all the evidence heard by the trial judge on such question. **Eatherly v. State**, 118 Tenn. 371. This meets the requirements of due process and equal protection as set out in **Leeper et al. v. State of Texas**, 139 U. S. 225, to the effect that by the Fourteenth Amendment the powers of states in dealing with crime within their borders are not limited except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law: that law in its regular course of administration through court of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary powers of the government unrestrained by the established principles of private right and distributive justice. **Hurtado v. California**, 110 U. S. 516, 535.

It is next insisted that a diminution of the record should have been ordered to show that the grand jury and petit jury were illegally selected. The portion of the record petitioner desired to have supplied by the clerk of the court below to show that these juries were illegally selected was made exhibits to the motion. The Supreme Court of Tennessee considered these exhibits and concluded that if the record were diminuted to the extent requested, it would not aid the petitioner. The Tennessee Supreme Court's reply to the motion was as follows:

> "In our opinion, these minute entries wholly fail to show the manner in which the individuals on these jury lists were selected. It follows from this that the entries could not show that the jury lists was compiled in a manner contrary to Chapter 178, Private Acts of 1911. While it is true that these minute entries show that the Chairman of the Jury Commission presented jury lists to the court below they

wholly fail to show how the names on the list were selected and who selected them. In fact, these entries fail to show anything about the manner in which the names were selected."

Appendix A6-A7.

Counsel for the Respondent insists that the Tennessee Supreme Court was eminently correct in denying the motion on the grounds that it would have added nothing pertinent to the question being raised in petitioner's behalf. It is difficult to understand how it could be thought the Tennessee Supreme Court could have held otnerwise on this question. At any rate, this had been the rule followed by the Tennessee Supreme Court on this question, **Standard Life Insurance Company of the South v. Adams**, 174 Tenn. 405, and, therefore, squares with the rule announced in the **Leeper** case and stated above.

Respectfully submitted,

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I certify that I forwarded a copy of this Answer to Petition for Writ of Certiorari to Mr. William E. Badgett, Attorney at Law, 608 Bank of Knoxville Building, Knoxville, Tennessee, on this the 16 day of July, 1964.

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